FES (a Division of Thermo Power) *and* Plumbers and Pipefitters Local 520 of the United Association. Case 5–CA–26276

January 19, 2001

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN TRUESDALE AND MEMBERS LIEBMAN AND HURTGEN

On May 11, 2000, the National Labor Relations Board issued its decision in this proceeding, setting forth the framework for analysis of refusal-to-consider and refusal-to-hire allegations. 331 NLRB No. 20. The Board adopted the judge's finding that the Respondent unlawfully refused to consider nine union applicants for employment, but remanded the case to the judge for further consideration of the refusal-to-hire allegations in light of the new framework. Specifically, the Board remanded the proceeding to the judge for the purposes of reopening the record and resolving the issue of whether any of the nine applicants would have been hired, absent the discriminatory refusal to consider them. However, because the Board agreed with the judge's rejection of the Respondent's "wage compatibility" criterion as a defense to the refusal-to-consider allegations, the Board held that any consideration of that criterion on remand with respect to the refusal-to-hire allegations must be confined to the facts as already found by the judge and that the record could not be reopened on that issue. Id. slip op. 9–10 and fn. 22.

On November 8, 2000, Administrative Law Judge Arthur J. Amchan issued the attached supplemental decision, finding that the Respondent violated Section 8(a)(3) and (1) of the Act by refusing to hire the nine applicants. Stipulations by the parties obviated the need for a further hearing. Thus, based on all-party stipulations, the judge found that there was an available job opening for each of the applicants. In addition, the Respondent stipulated that its basis for rejecting the union applicants was the same as that advanced previously (lack of "wage compatibility") and that it would raise no new defenses. Citing the Board's decision, the judge held that he would not reopen the record to receive further evidence with respect to that defense.

Thereafter, the Respondent filed exceptions and a supporting brief, "principally . . . for purposes of preserving issues for appeal." The Respondent states that it has, for that reason, incorporated by reference its initial exceptions and supporting brief. In addition, the Respondent argues that the judge erred in limiting the evidence it could present in support of its wage compatibility defense to the refusal-to-hire allegations. The General Counsel and the Charging Party filed answering briefs.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

As summarized above, the Respondent's exceptions raise no issue not previously considered by the Board.[1] Accordingly, we conclude that the Respondent's exceptions lack merit, and we shall adopt the judge's recommended Order as modified and set forth in full below.[2]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified and set forth in full below and orders that the Respondent, FES (a Division of Thermo Power), York, Pennsylvania, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to hire applicants on the basis of their union affiliation or based on the Respondent's belief or suspicion that they may engage in organizing activity once they are hired.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer Brian Bathavic, Thomas Bathavic III, Brett Emerich, John Ganoe, Kevin Goodman, George Heckert, Terry E. Peck, David Wagner, and Richard Walker II instatement to the positions for which they applied or, if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges.

(b) Make Brian Bathavic, Thomas Bathavic III, Brett Emerich, John Ganoe, Kevin Goodman, George Heckert, Terry E. Peck, David Wagner, and Richard Walker II whole for any loss of earnings and other benefits suffered as a result of the unlawful discrimination against them, in the manner set forth in the remedy section of the decision.

(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful refusal to hire Brain Bathavic, Thomas Bathavic III, Brett Emerich, John Ganoe, Kevin Goodman, George Heckert, Terry E.

[1] In accordance with the Board's settled practice, our review of the judge's supplemental decision is limited to the issues raised by the Respondent's exceptions. See, e.g., *Anniston Yarn Mills*, 103 NLRB 1495 (1953). We do not necessarily agree with the judge's discussion of what other defenses (apart from the "wage compatibility" defense) he would have entertained. In the absence of exceptions, we do not pass on this aspect of the judge's rationale.

[2] We shall modify the judge's recommended Order to provide the customary remedial language.

Peck, David Wagner, and Richard Walker II and, within 3 days thereafter, notify them in writing that this has been done and that the refusal to hire them will not be used against them in any way.

(d) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary or useful in analyzing the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its facility in York, Pennsylvania, copies of the attached notice marked "Appendix."[3] Copies of the notice, on forms provided by the Regional Director for Region 5, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since March 11, 1996.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

WE WILL NOT fail or refuse to hire job applicants on the basis of their union affiliation or based on our belief or suspicion that they may engage in organizing activity once they are hired.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of the Board's Order, offer Brian Bathavic, Thomas Bathavic III, Brett Emerich, John Ganoe, Kevin Goodman, George Heckert, Terry E. Peck, David Wagner, and Richard Walker II instatement to the positions for which they applied or, if those positions no longer exist, to substantially equivalent positions.

WE WILL make Brian Bathavic, Thomas Bathavic III, Brett Emerich, John Ganoe, Kevin Goodman, George Heckert, Terry E. Peck, David Wagner, and Richard Walker II whole for any loss of earnings and other benefits suffered as a result of our unlawful discrimination against them, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful refusal to hire Brian Bathavic, Thomas Bathavic III, Brett Emerich, John Ganoe, Kevin Goodman, George Heckert, Terry E. Peck, David Wagner, and Richard Walker II, and WE WILL, within 3 days thereafter, notify them in writing that this has been done and that the refusal to hire will not be used against them in any way.

FES (A DIVISION OF THERMO POWER)

Steven I. Sokolow, Esq., for the General Counsel.
Thomas R. Davies, Esq. (Harmon & Davies, P.C.), of Lancaster, Pennsylvania, for the Respondent.
Francis J. Martorana, Esq. (O'Donoghue & O'Donoghue), of Washington, D.C., for the Charging Party.

SUPPLEMENTAL DECISION

ARTHUR J. AMCHAN, Administrative Law Judge. On May 11, 2000, the Board remanded this case to me to determine whether the Respondent's failure to hire nine discriminatees constituted unlawful refusals to hire, warranting backpay and instatement remedies, *FES,* 331 NLRB No. 20.

In my initial decision, I found, and the Board agreed, that Respondent unlawfully refused to consider nine union applicants for welding and/or pipefitting positions at its York, Penn-

[3] If this Order is enforced by a judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

sylvania manufacturing plant and in its construction division.[1] However, the Board held that the question of whether any of the nine applicants would have been hired, absent the discriminatory refusal to consider, could not be deferred to compliance. It therefore remanded the case for the purposes of reopening the record and resolving this issue.

In its decision, the Board set out the elements of a discriminatory refusal to hire. The General Counsel must show at the hearing on the merits: (1) that the respondent was hiring, or had concrete plans to hire, at the time of the alleged unlawful conduct; (2) that the applicants had experience or training relevant to the announced or generally known requirements of the positions for hire, or in the alternative, that the employer has not adhered uniformly to such requirements, or that the requirements were themselves pretextual or were applied as a pretext for discrimination; and (3) that antiunion animus contributed to the decision not to hire the applicants, id. at 4. Once these elements are established, the burden shifts to the respondent to show that it would not have hired the applicants even in the absence of their union activity or affiliation.

The Board stated further that, in a discriminatory hiring case, the General Counsel must show that there was at least one available opening for the applicants. It also held that the General Counsel must show at the hearing on the merits the number of openings that were available. However, where the number of applicants exceeds the number of available jobs, the compliance proceeding may be used to determine which of the applicants would have been hired for the openings, id. at 6.

On June 27, 2000, I issued a notice and invitation to file briefs. I asked the parties to consider whether the existing record was sufficient to decide the issues presented. If not, I asked that the parties explore whether stipulations could be reached to obviate the need for reconvening the hearing. In the event that a party deemed a resumption of the hearing to be necessary, I asked that they describe the testimony that they intend to elicit and/or the documents they intended to introduce into the record. I stated that defenses that were fully litigated at the initial hearing and rejected would not be relitigated, citing the Board's decision at pages 9–10 fn. 22.

All parties filed supplemental briefs. Afterwards, I informed them that my review of the record indicated that the existing record established a refusal-to-hire violation with regard to five of the discriminatees. Although it appeared that Respondent hired at least eight welders to fill its personnel requisitions of January 15 and February 19, 1996, it was not clear whether all of these welders were hired after the discriminatees applied for jobs on February 9 and March 29, 1996.

I therefore informed the parties that I would convene a supplemental hearing solely to determine the following questions:

1. Whether Respondent hired a sufficient number of employees to provide an opening for each discriminatee.
2. With regard to any hiring that occurred subsequent to the opening of the initial hearing on July 20, 1998, whether the applicants would have been hired for such openings in the absence of the discriminatory refusal to consider them for hire.

I informed the parties that I would not consider evidence as to why Respondent would have considered the individuals it hired prior to July 20, 1998, more desirable than the discriminatees because I had already determined that the union applicants were not considered for employment for unlawful reasons. Respondent was therefore precluded from arguing that, if it had considered these applicants, it would have rejected them for lawful reasons. Moreover, I had already rejected FES's alternative rationales for failing to hire the discriminatees. Therefore, I concluded that Respondent was not entitled to a "second bite of the apple."

Respondent's hiring since the July 20, 1998 hearing, I opined, is distinguishable from that occurring before July 20, because FES did not have an opportunity at the initial hearing to meet its affirmative defense that it would not have hired any of the applicants for such openings for lawful reasons. However, I informed the parties that I would only consider such a defense if Respondent could demonstrate that at the time it hired other individuals, it considered the applications of the discriminatees and determined that another applicant had superior qualifications. I stated that I would not entertain a comparison of the qualifications of the discriminatees and persons hired after July 20, if no such comparison was made at the time the hiring decisions were made.

I again urged the parties to stipulate as to the names and dates that employees were hired in positions for which the discriminatees applied from February 9, 1996, until the present. Pursuant to that request, the parties have stipulated that the following individuals were hired prior to the July 20, 1998 hearing:

Name	*Hire Date*	*Classification*
Alan Leasure	3/11/96	welder/fitter Construction trainee
Shawn Rapp	3/18/96	welder/fitter Construction trainee
Charles Dusendschine	3/25/96	welder trainee
Stacy Keller	3/25/96	welder Trainee
Jeffrey Ray	4/15/96	welder trainee
Robert Zimmerman	4/22/96	welder
Phillip Shildt	6/2/97	welder

The parties have also stipulated that the following individuals were hired after the July 20, 1998 hearing:

Wayne Kneisley	1/11/99	welder

[1] In my initial decision, I found that all the union applicants had the qualifications set forth in FES's employee requisitions and newspaper job advertisements. None of the employees hired by Respondent prior to the July 20, 1998 hearing had such qualifications.

Gregory Wilt	1/25/99	welder trainee
Joel Dell	1/25/99	welder trainee
Jeremy Bracken	2/22/99	welder
Brad Minda	2/22/99	welder
Eric Morton	2/22/99	welder
Mark Pascale	2/22/99	welder
Chris Duvall	2/29/99	welder

Respondent further stipulated that its basis for rejecting the union applicants was the same as that advanced in the original hearing (e.g., "wage rate incompatibility") and that it would raise no new defenses. FES stipulated that it made no individual comparisons between the applications of the discriminatees and the individuals hired in 1999. Finally, the parties agreed that in light of the stipulation, a hearing on remand was unnecessary.

In view of the foregoing, I conclude that there was a job opening for each of the discriminatees and therefore Respondent has violated Section 8(a)(3) and (1) by refusing to hire each one of them.

CONCLUSION OF LAW

By refusing to hire applicants Brian Bathavic, Thomas Bathavic III, Brett Emerich, John Ganoe, Kevin Goodman, George Heckert, Terry E. Peck, David Wagner, and Richard Walker II Respondent violated Section 8(a)(1) and (3).

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

Having found that the Respondent violated Section 8(a)(1) and (3) of the Act by refusing to hire nine applicants for employment, it must offer them instatement and make them whole for any loss of earnings and other benefits, computed on a quarterly basis from the date they would have been hired, less any net interim earnings, as prescribed in *F. W. Woolworth Co.,* 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded,* 283 NLRB 1173 (1987).

[Recommended Order omitted from publication.]